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IN THE

# Supreme Court of the United States

October Terms, 1956

No. 867

UNITED STATES OF AMERICA for the use of EMMETT J. MALLOY,

*Petitioner,*

vs.

LESLIE S. BOWDEN as Trustee in Bankruptcy for the Estate of FRANK T. HICKEY, INC., Bankrupt; FIDELITY & DEPOSIT COMPANY OF MARYLAND, a corporation; TWAITS-MORRISON-KNUDSEN-MACCO, a joint venture; and the members of such joint venture, to wit: MORRISON KNUDSEN COMPANY, INC., and MACCO CORPORATION, corporations, and FORD J. TWAITS (individually and as trustee), EDNA M. TWAITS, JANE TWAITS LATAILLADE, CARL H. WITTENBERG and CARL H. WITTENBERG, JR., as partners associated in business under the firm name and style of FORD J. TWAITS CO., a partnership,

*Respondents.*

## Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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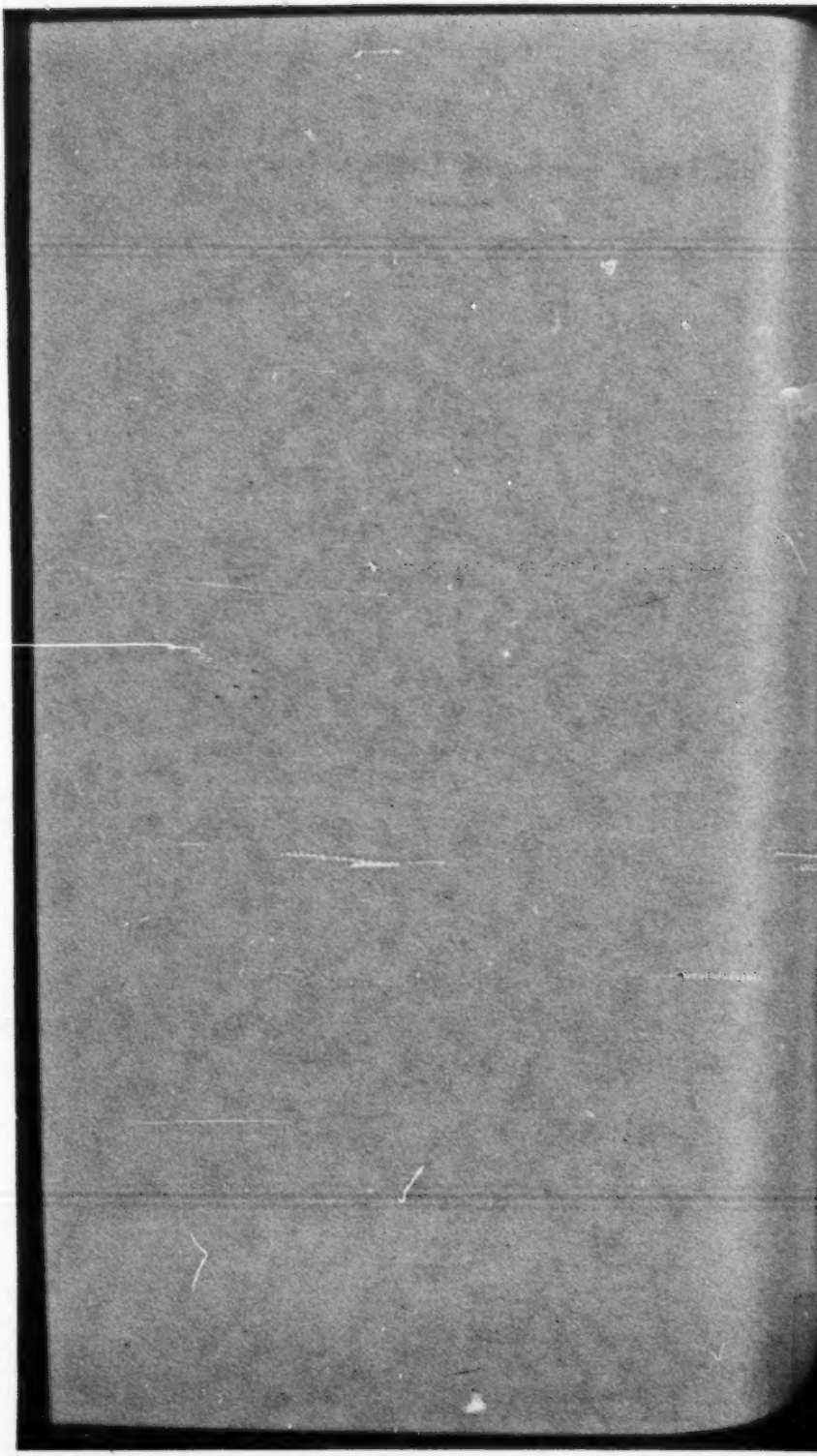

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*Respondents.*

**Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.**

Petitioner, the United States of America, for the use of Emmett J. Malloy, respectfully shows:

Petitioner is aggrieved by the decision of the United States Court of Appeals for the Ninth Circuit entered in the above entitled action, and prays that a writ of certiorari issue to review the same.

## Citation to Opinions Below.

The opinion of the Court of Appeals is reported at 239 F. 2d 572, and its opinion and judgment appear in the Record at pages 404-416, and in Appendix B hereto.

The opinion of the District Court is unreported. Its oral decision and its findings of fact and conclusions of law on the two aspects of the case appear in the Record at pages 33-34 (incorporating by reference pages 3-12 20-25, 29-33), and at pages 105-110, 362-371. The order denying preliminary injunction and judgment appear in the Record at pages 35 and 111-112, respectively.

## Jurisdiction.

The judgment of the Court of Appeals [R. 416] was entered on December 31, 1956. The jurisdiction of this Court is invoked under United States Code, Title 28, Section 1254(1).

## Matter Involved.

This case involves the respective liabilities of (1) the contractor on a federal public work, (2) the surety on its payment bond, and (3) the subcontract balance held by the contractor and owed by it to a bankrupt subcontractor for a debt of $5,895.54 owed by the subcontractor to a supplier of labor and material for the job.

Also involved are the respective priorities in such subcontract balance of (a) the supplier, (b) the trustee in bankruptcy of the subcontractor, and (c) a general creditor of the subcontractor.

A timely written notice of the supplier's debt, held to be irregular under the Miller Act, United States Code, Title 40, Section 270(b), was given the contractor by the subcontractor, and was acted upon by the contractor which

made a part payment based thereon direct to the supplier, all within the statutory 90-day period; and no prejudice whatever resulted from want of regular notice. The case involves the sufficiency of such notice, and in the face of, or despite, its irregularity, petitioner's ability to enforce payment of the supplier's debt from the contractor, the surety, or the subcontract balance aforesaid. The Court of Appeals denied petitioner all relief in reversing a District Court judgment on the bond. [R. 111, 416.]

**Statement of the Case.**

Petitioner brought this action for the use of the supplier, Emmett J. Malloy, in the United States District Court for the Southern District of California, against the contractor, Twaits-Morrison-Knudsen-Macco, a joint venture, composed of Ford J. Twaits Co., a partnership and two corporations, against the members thereof, and against Fidelity & Deposit Co. of Maryland, the surety, for judgment on the bond, and for the declaration and enforcement of an equitable lien on the subcontract balance held by the contractor for the amount of the debt. Petitioner also moved in the District Court for a preliminary injunction impounding the fund to the extent of the debt, upon affidavits showing threatened division of the subcontract balance by the contractor between the trustee in bankruptcy and Ford J. Twaits Co., a general creditor, to the exclusion of suppliers for the job, including Malloy. [R. 3-12, 18-33.]

The trustee in bankruptcy, Leslie S. Bowden, voluntarily intervened as a defendant. [R. 49, 103, 126.]

The District Court gave petitioner judgment against the contractor and surety for the amount of the debt, holding the notice sufficient under the Miller Act; but

denied relief against the fund, holding that no equitable lien existed thereon in favor of the supplier. [R. 33-36, 105-112.] Both plaintiff and defendants appealed. [R. 113-117.]

The Court of Appeals reversed the judgment as to all defendants and ordered the cause remanded with directions for entry of judgment against petitioner on the whole case [R. 414], holding:

(1) That the notice given the contractor was insufficient under the Miller Act, thus discharging the surety [R. 411-413];

(2) By implication, that the contractor was not bound by its contract with the Government to pay the subcontractor's suppliers (as third party beneficiaries), aside from the bond obligation and subject to the notice provision [R. 413];

(3) That no equitable lien exists on the subcontract balance for the benefit of the supplier. [R. 414.]

Each of these three holdings was clearly wrong.

**Summary of the Facts.**

The contract between the joint venture and the Government provided, among other things, as follows:

> "The contractor shall furnish the materials and perform the work * * *." [R. 240, Art. 1.] "The contractor * * * shall be responsible for all materials delivered (including government-furnished material and equipment delivered to the contractor, unless otherwise specifically provided), and work performed until completion and final acceptance." [R. 242, Art. 4.] "The obligation of the Government to make any payment under this Article 1 shall be subject to deduction in respect of * * * (2) In

> the discretion of the contracting officer shall be subject to deduction in respect of the amount of any claim of any subcontractor or supplier whose subcontract or order is related to the performance of this contract * * *." [R. 243, Art. 25, subp. (e).]

The condition of the payment bond, on which the above surety was obligated to the extent of $732,200, was that:

> "* * * the principal shall promptly make payment to all persons supplying labor and material in the prosecution of the work provided for in said contract, and any and all duly authorized modifications of said contract * * *." [R. 376-377.]

In the construction of launching facilities, roads and utilities at the Navy Air Missile Test Center at Point Magu, California, under the above contract, Frank T. Hickey, Inc., excavation subcontractor, using earth moving equipment furnished therefor by Emmett J. Malloy on a rental basis, became insolvent or greatly delinquent in payments to its suppliers, including Malloy, due to unexpected subsidence of earth, all of which was known to the contractor. Upon completing the subcontract on October 31, 1952 (a week after Malloy last furnished equipment), Hickey owed its suppliers for the job more than the subcontract balance due from the contractor.

In view of this, by agreement with Hickey, the contractor undertook the following arrangement:

(1) Upon receipt of a written request from Hickey, listing all its unpaid suppliers for the job and the balance due each therefor (Malloy being listed therein with a $11,791.09 balance), the contractor on December 15, 1952 drew and issued its check to each supplier so listed (payable jointly with Hickey) for the full listed balance due,

if under $1,000.00, and for half the listed balance due, if over $1,000.00. Malloy's check was for $5,895.55 (leaving the aforesaid $5,895.54 unpaid balance) for which he signed a receipt dated December 30, 1952, with an agreement therein "not to lien or authorize stop-payment orders in connection with this project for a period of four months unless notice of completion is filed." [R. 373-375.] These payments left $2,298.95 of the subcontract price unpaid, which the contractor retained pending the outcome of the subsidence claim next mentioned. [R. 408.]

(2) The contractor filed with the Government a claim for extra compensation for Hickey's work, because of the subsidence. This claim was allowed by change order for Hickey's benefit in January, 1954, in the sum of $29,120, whereupon, after deducting certain overhead charges, the contractor credited Hickey's account with $27,260 of the extra compensation, thereby increasing the subcontract balance in the contractor's hands to $29,558.95, as to which it asserted no claim and was a mere stakeholder. [R. 406-408.]

Meanwhile, on July 30, 1953, Hickey was adjudicated a voluntary bankrupt in the United States District Court for Southern California, and Leslie S. Bowden was appointed trustee in bankruptcy. [R. 408.]

On February 23, 1954, for Malloy's use, petitioner brought this action in the same court against the joint venture-contractor, its members and payment surety, for judgment for the supplier's unpaid bill and to have the

sum due declared and enforced as a lien upon the subcontract balance held by the contractor, superior to the claims of all persons. [R. 3-12.]

The extra compensation allowance was paid to the contractor March 25, 1954. [R. 408, 249.] The work as a whole was accepted by the Government in December, 1953, and final settlement was made on May 21, 1954. [R. 268-269.]

In April, 1954, petitioner learned that Ford J. Twaits Co. (a member of the joint venture) claimed to have a general debt against Hickey, on matters not related to the Point Magu job, in the sum of $58,316.01, and was claiming a right to a set-off of one-third of the $29,558.95 subcontract balance against the trustee in bankruptcy by reason thereof, and that the contractor had agreed to divide and pay the entire subcontract balance in its hands, $19,705,97 to the trustee in bankruptcy (for other general creditors) and $9,852.98 to Ford J. Twaits Co. on account of this claim, upon condition that the trustee would *not* contest the partnership's asserted claim and would litigate "in the bankruptcy court to determine which, if any, of the Miller Act claims (against the contractor and its surety) were valid, and upon the final determination of which claims were valid" would pay such claims up to $19,705.97. [R. 389-394.] Petitioner promptly moved the District Court for a preliminary injunction to impound and hold $6,798.42 of the subcontract balance in the contractor's hands pending and subject to the outcome of this action, under the doctrine of equitable lien, and sup-

ported the application with affidavits showing the threatened diversion and depletion of the fund. The District Court issued a temporary restraining order which caught $16,651.40 of the fund (the sum impounded plus the partnership allotment) in the contractor's hands; but the Court, on hearing the motion, refused to issue the injunction and vacated the restraining order upon findings that the facts stated in the affidavits and the complaint were true (for the purpose of the motion), but that on the facts there stated the subcontract balance was not subject to an equitable lien in favor of Malloy. [R. 18-34.]

During the ensuing trial the District Court refused to receive evidence relative to the diversion (although the contractor still had the $16,651.40 in hand) on the ground that he had finally determined the equitable lien claim in denying the injunction. No further findings with respect thereto were made. [R. 129, 134, 105-110.] The appeal resulted in holdings adverse to petitioner on all points.

**Questions Presented.**

1. Is an unpaid supplier of material and labor to a bankrupt subcontractor on a federal construction project entitled to an equitable lien or charge on the subcontract balance owed to the bankrupt by the contractor superior to the claims thereon of the subcontractor's general creditors and trustee in bankruptcy?

2. Is such supplier entitled to an injunction to prevent, to the extent of his claim, a threatened diversion and dissi-

pation of said subcontract balance by the contractor in payments to a general creditor and trustee in bankruptcy of the bankrupt?

3. Is notice under the Miller Act (40 U. S. C., Sec. 270b) a condition precedent to the contractor's liability on its *contract* obligation to pay all furnishers of material for the job, where it has in possession job proceeds belonging to a subcontractor and could not be prejudiced by paying the bill of a furnisher therefrom?

4. May a District Court lawfully find adequate compliance with the notice requirement of the Miller Act from timely actual notice of the bill of a subcontractor's furnisher, received by the contractor in the form of a letter from the subcontractor requesting payment of one-half thereof by the contractor, and pursuant to which request the contractor pays such half to the furnisher, all within the 90-day statutory period?

5. Is the notice provision of the Miller Act a condition of liability of the contractor and surety, respectively, or a mere device to prevent prejudice to either from want of notice?

**Statutes Involved.**

The statute involved is the Miller Act, *i.e.*, the Act of August 24, 1935, Chap. 642, 49 Stat. 793, 40 U. S. C., Secs. 270a-270d. A copy of the original Act appears at length in Appendix A hereto.

## REASONS FOR ISSUING THE WRIT.

### I.

### The Decision Herein Conflicts With the Decision of Another Court of Appeals as to the Requirements of Notice.

This conflict appears in footnote 10 of the opinion herein [R. 412], where the Court of Appeals for the Ninth Circuit disapproved of the opinion of the Court of Appeals for the Fifth Circuit in *Houston Fire & Casualty Co. v. United States, for Use of Trane Co.*, 217 F. 2d 727 (C. A. 5, 1954), on the formalities of written notice under Section 2 of the Miller Act, Act of August 24, 1935, Chap. 642, 49 Stat. 793, 40 U. S. C., Secs. 270a-270b.

The rule there stated for the Fifth Circuit is:

> "It is not necessary that the writing relied on be signed by the supplier, it is sufficient that there exists a writing from which, in connection with oral testimony, it plainly appears that the nature and state of the indebtedness was brought home to the general contractor. When this appears the object of the statute, to assure that the contractor will have notice, is attained and the statute is sufficiently complied with."

This rule is in harmony with liberal construction enjoined by this Court in *Fleisher Engineering & Construction Co. v. United States for Use of Hallenbeck*, 311 U. S. 15, 61 S. Ct. 81, 85 L. Ed. 12 (1940), affirming 107 F. 2d 925 (C. C. A. 2, 1939), and also with the following: *United States for Use of Birmingham Slag Co. v. Perry*, 115 F. 2d 724 (C. C. A. 5, 1940); *Coffee v. United States for Use of Gordon*, 157 F. 2d 968 (C. C. A. 5, 1946); *United States for Use of Franklin Paint Co., Inc. v. Kagan*, 129 Fed. Supp. 331 (D. C. Mass., 1955).

The contrary view, adopted by the Court in this case [R. 411], is the most rigid application of the rule *strictissimi juris* to the notice provision since this Court disapproved that rule in the above *Fleisher Co.* case (311 U. S. 18) in 1940; and even goes beyond the terms of the statute itself. The Court here states a drastic new rule for the Ninth Circuit, as follows:

> "* * * the writing must be sent or presented to the prime contractor by or on the authority of the supplier; and the writing must inform the prime contractor, expressly or by implication, that the supplier is looking to the contractor for payment of the subcontractor's bill." [R. 411.]

The words "claim" and "claimed" in the notice provision mean "claimed against the subcontractor," not against the contractor. This distinction is vastly important in routine business relations.

Also, as stated by the District Court herein [R. 366]:

> "The statute doesn't say it has to be in any particular form. It doesn't say it has to be signed by anybody. All it says is that a notice must be given. Notice was given. It was received by the contractor and acted upon by the contractor. I think it is too late for the contractor now to say notice was not sufficient."

In the face of such actual notice, when prejudice did not and could not result from the bare irregularity, to apply the harsh new rule adopted by the Court of Appeals here is to sacrifice justice to form.

The above cases, together with the cases of *United States for Use of Korosh v. Otis Williams Co.*, 30 Fed. Supp. 590 (D. C. Idaho, 1939), and *United States for*

*Use of Hargis v. Maryland Casualty Co.*, 64 Fed. Supp. 522 (D. C. So. Cal., 1946), demonstrate the difficulty of applying "liberally" an absolute requirement for written notice, when actual notice is had and no prejudice results from mere absence of a writing.

## II.

## The Decision Herein Conflicts With the Applicable Decisions of This Court and Other Courts of Appeals on Equitable Lien.

The only precedents cited in this case against the claim of equitable lien were cases decided in the Ninth Circuit, to wit: *In re Flotation Systems, Inc.*, 65 Fed. Supp. 698 (D. C. So. Cal., 1946), and *Bank of Arizona v. National Surety Corp.*, 237 F. 2d 90 (C. A. 9, 1956). [R. 414.]

The decision is predicated on a view that the only protection a federal supplier has is a suit on the bond.

In all other courts elsewhere, so far as we have been able to ascertain, the right of an unpaid supplier to an equitable lien on federal job proceeds in the hands of a stakeholder, in preference to the claims of general creditors and trustees in bankruptcy of a contractor has never been doubted. In *United States v. Munsey Trust Company*, 332 U. S. 234, 67 S. Ct. 1599, 91 L. Ed. 2022 (1947), this Court said:

> "From *Prairie State Bank v. United States*, 164 U. S. 227 to *American Surety Co. v. Sampsell*, 327 U. S. 269, we have recognized the peculiarly equitable claim of those responsible for the physical completion of building contracts to be paid from available moneys ahead of others whose claims come from the advance of money. But in all those cases, the owner was a mere stakeholder and had no rights of its own to assert."

This is the precise situation here, except that here the stakeholder-contractor is obligated by its contracts with the Government to pay third party beneficiaries, and received a waiver of the Government's retention right to so apply the money itself, upon such agreement.

The Court of Claims recognizes and enforces this priority for suppliers upon job funds retained by the Government. *Hadden, Trustee v. United States,* 132 Ct. Cl. 529, 132 Fed. Supp. 202 (1955); *National Surety Corp. v. United States,* 132 Ct. Cl. 724, 133 Fed. Supp. 381 (1955), cert. den. 350 U. S. 902, 100 L. Ed. 793, 76 S. Ct. 181 (1955); *Maryland Casualty Co. v. United States,* 100 Ct. Cl. 513 (1944).

In *American Surety Co. v. Sampsell,* 327 U. S. 269, 66 S. Ct. 571, 90 L. Ed. 663 (1946), this Court expressly held that failure to give statutory notice requisite to liability on a construction bond had no effect on priority in favor of materialmen and laborers in bankruptcy.

The decision here also conflicts with the following decisions of this Court as to the suppliers equitable priority or lien: *Martin v. National Surety Co.,* 300 U. S. 588, 57 S. Ct. 531, 81 L. Ed. 822 (1937); *American Surety Co. v. Westinghouse Electric Mfg. Co.,* 296 U. S. 133, 56 S. Ct. 9, 80 L. Ed. 105 (1935); *Henningsen v. United States Fidelity & Guaranty Co.,* 208 U. S. 404, 28 S. Ct. 389, 52 L. Ed. 547 (1908); *Prairie State Bank v. United States,* 164 U. S. 227, 17 S. Ct. 142, 41 L. Ed. 412 (1896).

The decision here also conflicts with the following decisions of other courts of appeal on the same matter: *United States Fidelity & Guaranty Co. v. United States,* 201 F. 2d 118 (C. A. 10, 1952); *United States Fidelity*

*& Guaranty Co. v. Sweeney,* 80 F. 2d 235 (C. C. A. 8, 1935); *Riverview State Bank v. Wentz,* 34 F. 2d 419 (C. C. A. 8, 1929); *London & Lancashire Indemnity Co. v. Enders,* 290 Fed. 98 (C. C. A. 8, 1923); *American Surety Co. v. Finletter,* 274 Fed. 152 (C. C. A. 3, 1921); *Belknap Hardware & Mfg. Co. v. Ohio River Contract Co.,* 271 Fed. 144 (C. C. A. 6, 1921); *In re P. McGarry & Son,* 240 Fed. 400 (C. C. A. 7, 1917); *United States ex rel. Johnson v. Morley Construction Co.,* 98 F. 2d 781 (C. C. A. 2, 1938), cert. den. 305 U. S. 651, 59 S. Ct. 244, 83 L. Ed. 421. (The fourth and the last citations in this paragraph involved extra compensation allowances.)

Also, the decision here conflicts with the following cases on equitable lien, as affected by amendments to the bankruptcy act: *In re William P. Bray Co.,* 127 Fed. Supp. 627 (D. C. Conn., 1954), and *Danais v. DeMatteo Construction Co.,* 102 Fed. Supp. 874 (D. C. N. H., 1952).

## III.

## The Decision Herein on the Question of the Contractor's Liability Is Probably in Conflict With Applicable Decisions of This Court.

The decision in effect holds that the contractors' contract liability to suppliers, and to the Government on their behalf, is limited to that of its surety on the payment bond.

The obligations of contractor on the contract in this case were to furnish all the labor and material, to be responsible therefor, and to have deducted from any pay-

ments the unpaid bills of any suppliers of labor or material. It was obligated as principal on the bond to promptly pay such suppliers. [R. 240-243, 376-377.]

In view of the foregoing, the decision of the Court of Appeals directing that the judgment be entered in the contractor's favor against petitioner and the supplier is apparently in conflict with the decisions of this Court in *American Surety Co. v. Westinghouse Electric Mfg. Co.*, 296 U. S. 133, 56 S. Ct. 9, 80 L. Ed. 105 (1935); *Mankin v. United States for Use of Ludowici-Celadon Co.*, 215 U. S. 533, 30 S. Ct. 174, 54 L. Ed. 315 (1910); and *United States for Use of Hill v. American Surety Co.*, 200 U. S. 197, 26 S. Ct. 168, 50 L. Ed. 437 (1906).

These cases hold that the language of the contract, construed in the light of the bond, obligates the contractor to pay the bills of suppliers to subcontractors, as third party beneficiaries; and the difference between his obligation and that of the surety is clearly stated therein. The contractor is liable by contract for all the bills; the surety is liable only on the terms of its bond. Either may be sued separately. *Belknap Hardware & Mfg. Co. v. Ohio River Contract Co.*, 271 Fed. 144 (C. C. A. 6, 1921); *Liebman v. United States*, 153 F. 2d 350 (C. C. A. 9, 1946); *Seaboard Surety Co. v. United States for Use of Marshall-Wells Co.*, 84 F. 2d 348 (C. C. A. 9, 1936); *Indemnity Insurance Co. v. Browning-Ferris Machinery Co.*, 227 F. 2d 804 (C. A. 5, 1955).

## IV.

**The Decision Herein That Lack of Formal Written Notice, Even Without Resulting Prejudice, Bars All Recovery on the Bond, Is Upon an Important Question Which Has Not Been, but Should Be, Settled by This Court.**

The notice, though informal, was held sufficient in *Fleisher Engineering & Construction Co. v. United States for Use of Hallenbeck,* 311 U. S. 15, 61 S. Ct. 81, 85 L. Ed. 12 (1940); hence the legal effect of an insufficient notice was not directly involved in that case, nor in any other case yet decided by this Court.

The lower federal courts have been extremely reluctant, as shown above, to bar all recovery to a supplier who, without any resulting prejudice whatever, has merely failed to give formal written notice of his claim, such as that described in Section 2 of the Miller Act. There is very good reason for this:

The only penalty attached to a failure to give the notice of default required in a private bond guaranteeing the collectibility of a debt is that the surety is discharged to the extent of any resulting prejudice. *Restatement of the Law-Security,* Sec. 137, p. 369.

This rule is also applied to government bonds of like nature. *Jack v. Craighead Rice Mill Co.,* 167 F. 2d 96 (C. C. A. 8, 1948), cert. den. 334 U. S. 829, 68 S. Ct. 1340, 92 L. Ed. 175; *United States for Use of J. B. Van Sciver Co. v. United States Fidelity & Guaranty Co.,* 178 Fed. 721 (C. C. Pa., 1910); *Guaranty Co. v. Pressed Brick Co.,* 191 U. S. 416, 48 L. Ed. 242, 24 S. Ct. 142 (1903).

The opening clause of Section 2 of the Miller Act creates an unconditional right of action on the bond in

favor of all suppliers, including the suppliers of subcontractors, as this Court held in the cases cited below. The ensuing notice *proviso* did not, and was not intended to withdraw that right and create still another right of action for the same beneficiaries limited to notice. It was manifestly intended merely to modify the right already conferred, with respect to certain beneficiaries, *i.e.*, subcontractors' suppliers, and not to withdraw the previously conferred right.

So construed, the statute means that such a supplier, who fails to give the statutory notice, will be limited in his recovery by the amount of any resulting prejudice to the contractor or surety. The language in *Mankin v. United States for Use of Ludowici-Celadon Co.*, 215 U. S. 533, 30 S. Ct. 174, 54 L. Ed. 315 (1910), which first suggested the notice provision, indicates that this is the true meaning of the notice; and under the liberal rules of construction applied in *United States for Use of A. Bryant Co. v. New York Steam Fitting Co.*, 235 U. S. 327, 59 L. Ed. 253, 35 S. Ct. 108 (1914), and *United States for the Use of Hill v. American Surety Co.*, 200 U. S. 197, 26 S. Ct. 168, 50 L. Ed. 437 (1906), the unnecessary and confusing language in the *proviso* may and should be disregarded.

> "Statutes are not to be so literally construed as to defeat the purpose of the legislature." (200 U. S. 203.)

The words "shall have a right of action upon said payment bond upon giving written notice" in the *proviso* contain repetitious surplusage, and merely mean "shall give written notice" in the time and manner indicated, with the usual effects for not doing so.

The notice provision, so construed, will give effect to the true intent of Congress and reduce the burden on the lower federal courts. The commend in *Restatement of the Law-Security*, p. 369, under Sec. 137 is:

> "Since the surety who has guaranteed collectibility of a principal's debt is only discharged to the extent of prejudice from failure to receive notice of what the creditor has done to enforce the principal's duty the surety is not discharged if he has actual knowledge or the creditor's action, even if notice has not been received from the creditor. In such a case the prejudice does not result from the failure to receive notice."

## IMPORTANCE OF THE QUESTIONS.

Here, for the first time, a Court of Appeals has adopted two new rules adversely affecting suppliers of labor and material for federal public works, *i.e.*, (1) no equitable lien upon job proceeds for such suppliers, and (2) no relief for a subcontractors' supplier against either contractor or surety, regardless of knowledge or prejudice, if service of a formal written claim for payment by the contractor is not made on the latter by the supplier within the statutory 90 days.

This decision deprives petitioner of rights under its contracts with contractors and payment sureties, made for the protection of such suppliers, without statutory cause; and make it impossible for the Government, when a subcontractor is bankrupt and his supplier has not, for any reason at all, served such formal demand, to regain, or to enforce the proper application, of money paid by the Government, in waiver of its retention rights, under bonded contract agreements that the contractor would pay all such suppliers' bills.

Treating Malloy as the real plaintiff and petitioner, the new rules deprive him of legal and equitable relief accorded other federal suppliers in all federal courts for over 60 years (ever since the passage of the materialmen's act of 1894), except in the District Court for the Southern District of California under the no equitable lien doctrine of *In re Flotation Systems, Inc.*, 65 Fed. Supp. 698 (D. C. So. Cal., 1946); and the danger is that such rulings will be followed elsewhere to the prejudice of all suppliers for federal jobs.

Federal contractors generally face the hazard under these new rules of having to pay general creditors of a bankrupt subcontractor (represented by the trustee in bankruptcy) the subcontract balance earned at the time of bankruptcy, and yet pay the subcontractor's suppliers in actions on the bond outside bankruptcy, under the doctrine of *In re Flotation Systems, Inc.*, 65 Fed. Supp. 698, *supra*. (The priority and protection of the equitable lien over the trustee's lien, outside bankruptcy, was adjudicated in *United States Fidelity & Guaranty Co. v. Sweeney*, 80 F. 2d 235 (C. C. A. 8, 1935).)

The only persons to be benefited by the new rules are general creditors of a bankrupt subcontractor, who contribute nothing to the job (represented by the trustee in bankruptcy), and such persons as Ford J. Twaits Co. who happen to occupy the dual position (being a member of the joint venture-contractor) of debtor to the subcontractor for the subcontract balance, and a general creditor of the subcontractor, at the same time.

This case arose out of the complicated plan of defendant Ford J. Twaits Co., evidenced by the novel compromise agreement with the trustee in bankruptcy [R. 392-396], to keep for itself, in preference to Hickey's job suppliers

and other general creditors, money received from the Government under its bonded agreement with the Government [R. 240-242, 378], to pay all suppliers for the job, yet with immunity for itself, its joint venturers, and payment surety under the Miller Act bond. The lower courts were not interested in this aspect of the case, and held that the sole question of decision was whether Malloy had given timely, formal notice of his claim to the contractor, which already knew thereof. [R. 34, 128-129, 134, 252-253, 291, 295-296.] This was erroneous oversimplification, and contrary to equal justice under law.

The judgment should have been against the contractor, including Ford J. Twaits Co., on the contract with an injunction impounding a part of the fund under an equitable lien, which should have been declared and enforced thereon; and also, against the contractor and surety on the bond, in view of their knowledge and the lack of any prejudice from want of formal written notice from Malloy.

## Conclusion.

The Petition for Writ of Certiorari should be granted, and appropriate relief decreed by this Court.

Respectfully submitted,

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